STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

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FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY
HENN CO. DISTRICT
ADMINISTRATOR

Luke Ricci and Traci Ricci, Terri Seck, and Terri Baumgartner, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Ameriquest Mortgage Company, a Delaware corporation, and Doe Corporation,

Defendants.

ORDER Granting Motion to Strike Bomchill Declaration and Granting Motion to Certify Class Action

Court File No. 27-CV-05-2546

The above-entitled matter came on for hearing before Judge Lloyd B. Zimmerman on April 5, 2007 on Plaintiffs' Motion for Class Certification, and Defendant Ameriquest Mortgage Company's Motion to Strike the Declaration of Mark Bomchill.

APPEARANCES:

Caryn Becker and Kelly M. Dermody, Esqs., Lieff, Cabraser, Heimann & Bernstein, L.L.P., of San Francisco, California; and J. Gordon Rudd, Jr., Esq., Zimmerman Reed, P.L.L.P., appeared for the Plaintiffs.

Thomas P. Swigert and Bryan C. Keane, Esqs., Dorsey & Whitney, L.L.P., appeared for Defendant Ameriquest Mortgage Company ("Ameriquest").

A. Background of the Case

The Plaintiffs allege that Ameriquest has engaged in unlawful business practices against Minnesota borrowers through its solicitation and closing of residential mortgage transactions in Minnesota. The Plaintiffs have alleged that Ameriquest violated the Consumer Fraud Act, Minn. Stat. § 325F.68 *et seq.*, the Minnesota Deceptive Trade Practices Act ("MDTPA"), Minn. Stat. § 325D.44 *et seq.*, and committed fraud by concealment.

The Plaintiffs allege that for an eight year period, spanning from 1999 to the present, Ameriquest engaged in a "common scheme, perpetrated from Ameriquest headquarters, to target vulnerable prospective borrowers." The Plaintiffs seek to certify a class of approximately 22,000 Minnesota borrowers who took out Ameriquest loans in this period. The Plaintiffs assert that Ameriquest's "sales force followed uniform policies and uniform training to systematically mislead these targets into taking loans that had negative, unwanted, and undisclosed common features and charges."

Ameriquest contends that the claims of the four proposed representatives are starkly distinct and inconsistent, and fail to satisfy any of the elements for class certification. Ameriquest asserts that "to certify such a class would lead to unmanageable legal chaos for this Court, and an inherently unreliable and unjust method to adjudicate what are, on their face, individual claims." Put another way, Ameriquest states that "to reopen and examine 22,000 transactions in light of Plaintiff's evidence that less than 2% have complaints (of unmeasured merit) is tantamount to a hospital adopting an across-the-board policy of treating all heartburn with quadruple bypass surgery."

1. Plaintiffs' Proposed Class

The Plaintiffs propose that the Court certify a class defined as follows:

All persons (i) who presently own, or during the Class Period owned, property (including mobile homes) in Minnesota, and (ii) who entered into a mortgage loan transaction relating to such Minnesota property with Defendant or its predecessors, directly or indirectly, at any time between February 17, 1999, and the present ("the Class").

Excluded from the Class are any judicial officer assigned to this matter; Defendant; the parents, subsidiaries and affiliates, officers and directors of Defendant or any entity in which a Defendant has a controlling interest; and the legal representatives, successors, or assigns of any such excluded persons.

2. Standard of Review

The requirements for a class action are set forth in Minn. R. Civ. P. 23. Whether to certify a class is generally determined in a two-step process. First, the Court must assess whether the Plaintiffs have established sufficient numerosity, commonality, typicality, and adequacy of representation, which are prerequisites to class certification. Minn. R. Civ. P. 23.02(a)-(d). Second, the Court must determine whether common questions of law and fact predominate over individual claims, and whether a class action is superior to other methods available for the fair and efficient adjudication of claims. Minn. R. Civ. P. 23.02(c). The burden of proof to establish each of the elements of a class action rests on the plaintiffs. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Parkhill v. Minn. Mut. Life. Ins. Co.*, 188 F.R.D. 332, 337 (D. Minn. 1999). The Court may certify a class only if it is satisfied "after rigorous analysis" that all of the Rule 23 requirements are met. *Jenson v. Evelyth Taconite Co.*, 139 F.R.D. 657, 659 (D. Minn. 1991).

3. **Plaintiffs' Class Action Allegations**

In determining whether to certify a class allegation, the Court generally does not rule on the merits of the case, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157-58 (1974), and takes as true the substantive allegations in the complaint. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688 (D. Minn. 1995). Rule 23 does not grant the Court "any authority to conduct a preliminary inquiry inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 157. Thus, to the extent that the parties have introduced evidence which goes to the merit of the claims, the Court considers that evidence only as it touches on the Court's analysis of class certification criteria set forth in Minn. R. Civ. 23.

The Plaintiffs allege that Ameriquest has engaged in uniform unfair, unconscionable, deceptive, and unlawful business practices in soliciting and closing residential mortgage loans in Minnesota, and that these claims are suitable for class certification; that Ameriquest trains and

encourages its sales staff to engage in predatory high-pressure sales tactics against low-income, vulnerable consumers; that Ameriquest has trained its sales staff to falsely represent the alleged benefits and financial savings of consolidating debt, and to maximize loan amounts beyond what is affordable or beneficial to borrowers through a variety of nefarious means; that Ameriquest systematically fails to provide loan documents prior to closing; that Ameriquest conceals unfavorable loan terms such as "discount" fees, pre-payment penalties, and the adjustable nature of the loan; that Ameriquest inflates appraisal values, fabricates income statements, and forges documents; and that Amerquest targets individuals who pose a credit risk and may be unable to obtain financing elsewhere, such as persons with credit problems, significant debt, or recent tax liens or bankruptcies. In summary, Ameriquest allegedly preys on vulnerable prospects by offering to reduce their debt, lower their monthly payments, and consolidate their existing debt obligations, allegedly to the consumer's financial advantage, but actually to their detriment.

Ameriquest rejects the Plaintiffs broad-brush attack on what is generally characterized as the "subprime" lending industry, comprised of lenders who extend needed credit to borrowers with poor or minimal credit histories.[1] Ameriquest underscores that it is required to comply with an extensive framework of federal and state laws and regulations enacted to protect consumers, and that its compliance with these laws demonstrates that these claims are unsuitable for class treatment. Ameriquest points to the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, reflecting a legislative judgment to regulate the industry through disclosure, rather than rate setting. RESPA does not prescribe the amount of closing fees, but instead requires that consumers receive multiple disclosures. *See* 12 U.S.C. § 2607 (c). In addition, the Truth in Lending Act ("TILA"), 15 U.S.C. § 1605-1606, requires standardized disclosures about the finance

[1] *See* Leventahl Aff. at Ex. 5.

charge and annual percentage rate for a loan. (2006).

In addition to the federal regulatory scheme, Minnesota law requires that lenders disclose whether a borrower is required to establish and maintain an escrow account for the payment of insurance premiums, property taxes, or other applicable charges. Minn. Stat. § 47.20, subd. 9. On top of this regulatory scheme, in January 2006, Ameriquest entered into a settlement agreement with the Attorney Generals of 47 states, agreeing to extensive disclosures and safeguards.

Ameriquest observes that despite the broad-based, sweeping claims of misconduct, the Plaintiff class has not alleged that Ameriquest has violated any of the federal or state laws which comprise this regulatory scheme.

The Plaintiffs support their motion for class certification with a voluminous record which allegedly shows that Ameriquest's sales staff are trained to (1) avoid direct responses to rate or fee inquiries by prospective borrowers; (2) falsely represent that Ameriquest loans offer monetary savings through debt consolidation, access to cash through extended equity programs, tax savings, shorter loan terms, and payment referrals; and (3) maximize loan amounts to the detriment of borrowers by encouraging substantial debt consolidation and a maximum cash out, and touting Ameriquest's high loan-to-value ratio.

The Plaintiffs aver that over an eight year period, Ameriquest has systematically pressured low-income, vulnerable borrowers by a variety of bait and switch or concealment tactics, including encouraging borrowers not to read loan documents, concealing or switching loan terms in the final closing documents, and offering loans that borrowers cannot afford and which offer no real benefit. The Plaintiffs allege that Ameriquest's "culture" includes the "common and accepted practice" of sales staff forging or altering borrower information or loan documents, and concealing key loan terms such as the pre-payment penalty, the discount points, and the adjustable nature of the loan.

The Plaintiffs describe a work environment at Ameriquest which emphasizes high-pressure salesmanship, high and aggressive loan quotas, and a compensation policy which rewards sales staff for high volume sales.

The Plaintiffs offer primarily three types of evidence to support their claim of broad, systemic, class wide fraud and deception encompassing 22,000 Minnesota consumers who borrowed money for residential mortgages from Ameriquest for the period of 1999 to the present. First, a January 2006 nationwide settlement involving many of the claims present here, entered into between 47 State Attorneys' General and Ameriquest. Second, a declaration by Mark Bomchill, a former Ameriquest employee, attesting to a widespread deceptive practices and policies. Third, plaintiffs proffer Ameriquest documents which describe the company's sales policies and practices. As noted above, the Court is required to assume the allegations in the complaint to be true for the purpose of class certification, and not to assess the weight or strength of the evidence supporting class certification. *Eisen*, 417 U.S. at 157-58. Nonetheless, because the parties argue the significance of the three types of evidence with respect to class issues, the Court will address the claims.

4. The January 2006 Attorney Generals' Settlement

The Plaintiffs point to a settlement on January 23, 2006 between the Attorney Generals of 47 states (including Minnesota) and Ameriquest. The settlement includes extensive injunctive relief and a $295 million cash settlement to participating aggrieved borrowers.[2] In connection with the settlement, the Plaintiffs cite a press release issued by Minnesota Attorney General Mike Hatch on January 23, 2006, announcing that his office had received over 300 complaints from Minnesota

[2] The Plaintiffs state that only a "small part" of the $295 million cash settlement will be available to Minnesota consumers who opt in to participate, and that the amount represents a substantial discount of Ameriquest's potential exposure. In addition, the Plaintiffs aver that nationwide, 30% of potential borrowers will not participate in the

borrowers "who were roped into subprime mortgage refinancing loans they could not afford or otherwise victimized by the company's deceptive and fraudulent practices." The Minnesota Attorney General's January 2006 press release states that an investigation of the complaints by the Attorney General's office concluded that (1) Ameriquest representatives had fabricated or inflated borrower income in order to qualify prospective borrowers for Ameriquest loans; (2) overstated the fair market value of homes in order to qualify borrowers for Ameriquest loans; (3) routinely made deceptive and misleading statements concerning interest rates, discount points, and prepayment penalties; (4) failed to fund loans in a timely manner after closing; and (5) failed to provide borrowers with loan terms initially promised to them. The Plaintiffs further point to changes made by Ameriquest in May 2006, following the settlement, in which Ameriquest closed 250 branches, and modified the job responsibility of its sales force to increase training and to separate job responsibilities for its sales force and mortgage closers.[3]

The Minnesota Attorney General settlement suggests that Plaintiffs' claims have been independently investigated, and that class-wide injunctive and monetary relief has been implemented. However, the Court cannot afford any substantive weight to the settlement without violating the non-admissions clause in the settlement, violating its own charter not to assess the merit of the claims, or assessing the validity of the 300 complaints without any information about the particulars of the complaints. Moreover, the settlement has an opt-out feature, and except for those individual class members who accept the benefits of the Attorney General settlement, that

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settlement at all, "leaving many thousands in Minnesota without any monetary remedy for these practices short of this class litigation." (Plaintiff's Memorandum of Law in Support of Class Certification 17, n. 8, filed Feb. 2, 2007.

[3] By letter dated April 6, 2007, Ameriquest provided the Court with a recent case holding that private individuals cannot assert claims under the Minnesota Consumer Fraud Act where the Attorney General has already settled those claims. See *Wiegand v. Walser Automotive Group, Inc.*, No. A05-1911, 2006 WL 1529511 (Minn Ct. App. June 6, 2006). Plaintiff's counsel responded by letter dated April 10, 2007. The Court would prefer to address the effect of *Wiegand* in Ameriquest's upcoming motion for summary judgment, after full briefing and an opportunity for argument.

resolution does not foreclose the claims made here.

5. The Mark Bomchill Declaration

Second, the Plaintiffs rely extensively in their moving papers on the February 2, 2007 Declaration of Mark Bomchill, who worked in Ameriquest's Plymouth office for about one year. Mr. Bomchill avers that in his year at Ameriquest, he closed approximately 90-100 loans. None of the loans were for any of the named Plaintiffs. Nor does he acknowledge that he personally engaged in any deceptive or fraudulent conduct. He attests that he worked under Ameriquest policies and practices which emphasized high-pressure, high-productivity sales calls, and that sales staff were subject to aggressive sales quotas. He states that Ameriquest taught and encouraged its sales staff to promote mortgage loans as a means of consolidating existing unsecured debt, and as a means to mislead customers into believing that such loans would save them money. He alleges a variety of other practices, including that Ameriquest taught him and other sales staff to inflate appraisal values, and that it was a common and open practice at Ameriquest for sales staff to forge or alter documents in order to close loans.

Mr. Bomchill alleges that Ameriquest sales staff engaged in at least nine specific sales practices that were deceptive or fraudulent: (1) regularly lied to and misled borrowers about their credit scores, in order to suggest to customers that they could not get a better loan elsewhere; (2) regularly concealed or obfuscated the existence of the prepayment penalty in Ameriquest loans; (3) regularly concealed or obfuscated that a loan was an adjustable rate mortgage, rather than a fixed mortgage; (4) regularly concealed that the payoff of a borrower's existing loan included a prepayment penalty, which meant that the borrower would receive less cash from the refinancing than promised; (5) regularly concealed and obfuscated the loan fees, the interest rate, and the monthly payment amount; (6) regularly concealed that a customer's loan did not include monthly

escrow payments for property taxes and insurance, and led customers to believe that the payments included those amounts; (7) regularly misled borrowers who discovered the prepayment penalties into believing that the fee would be waived if they refinanced within the next six months; (8) misled customers into believing they could refinance at a better rate if they improved their credit score; and (9) misled borrowers into believing that their right to cancel within one week had passed when in fact it had not.

The Court addresses Mr. Bomchill's declaration below in the context of Ameriquest's motion to strike the declaration.

6. Ameriquest Documents Describing Company Sales Policies and Practices.

Third, the Plaintiffs cite to a voluminous record describing the sales practices, compensation structure, and policies of the company. These documents are generally submitted under a protective order which maintains their confidential nature. They generally contain sales and productivity goals, sales methods, methods of overcoming objections, and compensation structure and goals for Ameriquest. The Plaintiffs point to the documents as demonstrating a backdrop and the culture by which unlawful high pressure sales tactics have occurred. However, the Plaintiffs do not point to anything in the company documents which specifically adopts an unlawful sales policy, or which explicitly advocates or supports deceptive, fraudulent, misleading or unlawful sales methods.

7. The Three Proposed Class Representatives

The proposed Plaintiff class proffers three class representatives to represent the putative class of 22,000 Minnesota borrowers for the proposed class period of 1999 to the present: (a) Luke and Tracy Ricci; (b) Terry Seck; and (c) Terry Baum.

a. Luke and Tracy Ricci

In or around September 2002, Luke and Traci Ricci, seeking to consolidate approximately

$165,000 in debt, applied to refinance their mortgage loan with Ameriquest. The Riccis had bought their home in late 2001 for approximately $145,000, and elected to refinance their home and consolidate their credit card and other debt. The Riccis maintain that Ameriquest obtained an inflated $165,000 appraisal of their home, despite the fact that they had purchased their home 11 months earlier for $145,000. They further allege that Ameriquest failed to provide them with any loan documents or disclosures prior to October 14, 2004, the date they closed on their mortgage loan. They allege that Ameriquest did not disclose that the loan included an adjustable rate component, and that at the time of closing, they were given only blank documents, despite repeated requests for a full set of signed documents. They allege that Ameriquest represented that they would receive an interest rate of 6.5%, when in fact the interest rate included a loan with an adjustable rate component and an initial interest rate of 9.5%. The Riccis further allege that Ameriquest did not disclose a three-year prepayment penalty, or excessive loan processing and administrative fees. The Riccis allege that as a result of the inflated appraisal, excessive closing costs, and the prepayment penalty, they were unable to sell their house when they sought to do so in 2003. The Riccis were able to sell their home for $176,000 in August 2004, after an earlier purchaser made an offer of $181,000 but then reneged.

b. Terri Seck

In or around October 2002, Ameriquest allegedly contacted Terri Seck by phone to ask whether the Secks were interested in refinancing their mortgage. Ameriquest allegedly told Mrs. Seck that it could offer her a lower interest rate than her existing rate of 7.0%, and then offered her a rate of 6.99%. Ameriquest contends that their November 19, 2002 loan paid off their pre-existing loan which had a 7% rate, and also paid off a home improvement loan on which the Secks owed $19,500 and, and other credit card and related debt amounting to $29,000. Ameriquest suggests

that despite the Secks' alleged failure to provide discovery which would identify the interest rate for these other debts, that the 6.99% loan was a favorable rate of interest for the Secks.

The Secks allege that Ameriquest allegedly engaged in misleading, high-pressure sales tactics by failing to provide any documents or disclosures prior to the time of closing, by failing to disclose a three-year prepayment penalty prior to closing, and by charging fees for an illusory discount, as well as excessive loan processing and administrative fees. When the Secks raised concerns about the closing fees, Ameriquest allegedly told the Secks that the "discount fee" was deductible on their taxes, when in fact, it was not. Ameriquest rejoins that the Secks received full disclosures, elected to go forward with the loan, and have not identified which fees and costs they believe to be excessive.

c. Terry Baumgartner

Baumgartner, who lives in Duluth, obtained five mortgage loans between 2001 and 2004 – two from Ameriquest. Baumgartner testified that she obtained her Ameriquest loan in order to reduce her interest rate with National City Mortgage Company, and that she also needed the Ameriquest loan in order to pay off a judgment from a gambling debt.

In or around September 2003, Ameriquest allegedly contacted Terry Baumgartner by phone in response to her inquiry over the internet. Ameriquest allegedly encouraged Baumgartner to apply for and qualify for an adjustable rate mortgage loan of $87,750, with an initial rate of interest of 9.5%, by providing fabricated income information, misrepresenting on the loan papers that she was working as a "consultant" or employed in child care when she was not, and that she earned $2,000 a month when at best she received $600.00 a month in social security.

Ameriquest allegedly forged Baumgartner's signature on tax and other documents, failed to provide her with loan disclosures prior to the time of closing, and rushed her through the closing,

deflecting her questions and showing her only portions of the loan papers. Ameriquest allegedly misled Baumgartner into believing that her loan interest rate was 6.750% when in fact it included an adjustable rate of 9.5%, and she was allegedly misled into believing that she would receive more cash from the refinancing than she actually received. In addition, her mortgage allegedly included an undisclosed three-year prepayment penalty, excessive loan processing and administrative fees, and excessive and undisclosed "discount" fees.

B. Legal Analysis

The Court is presented with two interrelated motions: First, the Plaintiffs' motion to certify a class, and second, Ameriquest's motion to strike the Declaration of Mark Bomchill. Because the resolution of the second motion is relevant to the Court's discussion of class certification issues, the Court addresses the motion to strike first.

1. Motion to Strike Declaration of Mark Bomchilll

The Plaintiffs filed this suit on February 17, 2005, and make broad allegations of class-wide fraud and deception. The parties have conducted broad discovery of the claims. The Court's pre-trial order required that Plaintiff's motion for class certification be served on February 2, 2007, with the understanding that the parties would have a full opportunity to conduct full and fair discovery on class certification and other issues.[4] On February 2, 2007, the Plaintiffs filed their motion for class certification. For the first time, on the day of the motion, the Plaintiffs served on Ameriquest a seven-page Declaration of Mark Bomchill signed by Mr. Bomchill on January 28, 2007. The Declaration makes specific and sweeping allegations of unlawful conduct, and it is a key item of evidence that Plaintiffs cite repeatedly in their motion for class certification.

It is undisputed that the Plaintiffs never identified Mr. Bomchill as a person with knowledge

[4] The original deadline set by the Court was January 19, 2007, and it was extended after a request by the parties.

at any time prior to February 2, 2007, despite numerous requests by Ameriquest, going back at least seven months previously, seeking the identity of persons with knowledge. In addition, on December 18, 2006, the Court granted Ameriquest's motion to compel answers to all interrogatories which identify the basis for the class allegations. Ameriquest brought that motion because, as Ameriquest explained to the Court in its December 15, 2006 submission, "plaintiffs' refusal to answer . . . interrogatories prevents Ameriquest from knowing what potential witnesses to contact or depose, and it creates the risk that Ameriquest will be blindsided by affidavits from unknown individuals who purportedly have provided plaintiffs with the basis for their allegations."

The Plaintiffs claim they were not aware of Mr. Bomchill until sometime after January 4, 2007 – less than two weeks before the motion for class certification was originally due, in a class action suit that had been pending for almost two years. The Plaintiffs allege they first became aware of Mr. Bomchill on January 4, 2007, when Kamran Mashayekh, one of Plaintiffs' counsel with the Texas law firm of The Tien Law Group, L.L.C., first spoke to Mr. Bomchill. The Plaintiffs' allege that attorney Mashayekh screened Mr. Bomchill for a possible interview with Caryn Becker from Lieff, Cabraser, Heimann & Bernstein, Plaintiffs' lead counsel. Ms. Becker interviewed Mr. Bomchill in depth on January 11, 2007, followed up with several short telephone interviews, and ultimately secured Mr. Bomchill's executed declaration on January 23, 2007. The Plaintiffs produced Mr. Bomchill's declaration for the first time on February 2, 2007, and for the first time, supplemented interrogatory answers identifying Mr. Bomchill as a person with relevant information on February 15, 2007.

The Court finds no reason to doubt the veracity of Plaintiffs lead class counsel, Caryn Becker, in her sworn statement that she first became aware of Mr. Bomchill on January 4, 2007. However, conspicuously absent from the record is any affidavit from attorney Kamran Mashayekh,

Ms. Becker's co-counsel from an allied law firm in Texas, explaining when attorney Mashayekh first became aware of Mr. Bomchill's existence or the information he might have to share. Nor have Plaintiffs provided any further affidavit or declaration from Mr. Bomchill explaining how he first came to contact attorney Mashayekh. At the same time, Ameriquest points to eight major claims of improper, deceptive, or fraudulent practices in Plaintiffs' February 17, 2005 Complaint that are supported in the class certification motion only by Bomchill's January 23, 2007 declaration.[5] On this record, the absence of evidence which explains when Ms. Becker's Texas co-counsel became aware of Mr. Bomchill, or when Mr. Bomchill first communicated with the Plaintiff class, is disturbing. The suggestion that the most powerful evidence that Plaintiffs possess to support their class claims, in a suit pending for two years, would only be filed on the day of the class certification motion, defies credulity. This is particularly so after Ameriquest brought the problem of Plaintiffs refusal to answer class contention interrogatories to the attention of the Court in mid-December 2006, and Plaintiffs were ordered to provide full and complete answers.[6]

The Plaintiffs' suggestion that Ameriquest has suffered no harm because Ameriquest had the opportunity to depose Mr. Bomchill after February 4, 2007 is unpersuasive. The Court previously advised counsel for all parties that the Court would insist on fair discovery, and not allow any form of trial by ambush. Plaintiffs have disclosed a key witness for the first time on the same day that they filed their class certification motion, in a manner that, viewed objectively, can only be considered calculated to put Ameriquest at a strategic disadvantage. The Court will not require Ameriquest to first conduct significant discovery on serious class allegations after the class allegation motion has already been filed, because to do so flouts the entire point of permitting

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[5] Plaintiffs' complaint ¶¶ 18, 19, 20, 28(b), 28(c), 28(d), 29, 30

[6] Minimally, it is undisputed that Plaintiffs' attorney Kamran Mashwuekh "screened" Mr. Bomchill on January 4, 2007 – the same day that Plaintiffs served supplemental interrogatory answers identifying persons with knowledge, and that

months of class certification discovery.

The Court has the means to enforce its discovery orders or compliance with the discovery rules. "A court is vested with authority to strike pleadings and render a judgment by default against a disobedient party who fails to comply or respond to discovery orders or requests." *Discover Bank v. Sanderson*, No. A03-1909, 2004 WL 1445482, at *2 (Minn. Ct. App. June 29, 2004). The Court finds that Plaintiffs' class counsel has failed to document that Mr. Bomchill first came to their attention on January 4, 2007, because neither Mr. Bomchill nor attorney Mashayekh have provided first-hand evidence that this is so. The Court finds no adequate justification for first disclosing Mr. Bomchill's identity or claims only on February 4, 2007, and finds that the sanction of not allowing his declaration to be considered in the context of the class certification motion is narrowly tailored to the abuse. Consequently, the Court grants Ameriquest's motion to strike the Declaration of Mark Bomchill. [7]

2. Class Certification Analysis

The Court now turns to question of whether the Plaintiffs have established the elements of a class action under Minn. R. Civ. P. 23.01 and 23.02. The Court first examines whether the Plaintiffs have met the requirements of numerosity, commonality, typicality, and adequacy of representation set forth in Minn. R. Civ. P. 23.01. If those requirements are satisfied, the Court must further determine whether the Plaintiffs meet the requirements of Minn. R. Civ. P. 23.02, which apply where damages are sought.

a. Minn. R. Civ. P. 23. 01 Requirements

Plaintiffs' lead counsel conduct an in-depth interview with Mr. Bomchill on January 11, 2007.

[7] The Court's sanction is limited at this juncture to consideration of Mr. Bomchill's declaration for the purpose of class certification. The Court is not yet faced with a motion to preclude use of his declaration, or the affidavit of any other witness, at trial, or in response to a summary judgment motion, based upon a failure to make an appropriate disclosure in discovery. The Court recognizes that discovery might shed further light on when Mr. Bomchill first communicated with any class counsel, and whether attorney Mashayekh first had knowledge of relevant discoverable

i. **Numerosity**

Minn. R. Civ. 23.01(a) requires that a class be "so numerous that joinder of all members is impracticable." Minn. R. Civ. 23.01(a); *Streich v. Am. Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 217 (Minn. Ct. App. 1987). The Plaintiffs' proposed class includes Minnesota borrowers between 1999 and the present. The record reflects that Ameriquest entered into approximately 22,000 loans with Minnesota borrowers between February 17, 1999 and May 31, 2006. Ameriquest rejoins that the proposed class is "absurdly broad," and fails to identify those individuals who have actual or potential claims. Moreover, Ameriquest argues that the broad-based nature of the Plaintiff's claims make it difficult or impossible to determine how many potential class members are aggrieved by a particular type of claim, such as inflated appraisals, "bait and switch" complaints, or forged documents. In addition, Ameriquest points to the Minnesota Attorney General's report "of over 300 complaints about Ameriquest" from more than 22,000 Ameriquest customers to demonstrate that at worst, only about 1% of Ameriquest's Minnesota borrowers have a complaint.

The Court finds that despite the potential for uncertainty in the exact number of claims, and the potential for variation in the factual circumstances of the putative class, the range of 300 to 22,000 claims is sufficient to meet the numerosity requirement of Minn. R. Civ. P. 23.01(a). With respect to numerosity, the analysis is essentially whether the number of class members is sufficiently great that joinder is impracticable. *Franklin v. Chicago*, 102 F.R.D. 944, 949 (N.D. Ill 1984); *see Baer v. G&T Trucking Co.*, No. 03-3460, 2005 WL 563107, *12 n.2 (D. Minn. Mar. 1, 2005) ("The rule of thumb is that the existence of 40-plus class members raises a presumption that joinder is impracticable, and a class that size should meet the test of Rule 23(a)(1) on that fact alone.").

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information prior to January 4, 2007.

In addition, the variation of factual circumstances within the class-wide fraud and deceptive trade claims does not defeat a claim of numerosity. If it did, the most egregious violator of the law could escape class certification by the sheer multiplicity of the ways in which it committed fraud or deceptive practices. While it is unclear on this record how many of the Ameriquest borrowers between 1999 and the present were adversely affected by the alleged practices, the class of potentially aggrieved individuals is sufficiently large to satisfy the numerosity requirements of Minn. R. Civ. 23.01 (a).

ii. **Commonality**

Minn. R. Civ. P. 23.01(b) requires that the Plaintiffs demonstrate that "there are questions of law or fact" common to the class. Minn. R. Civ. P. 23.01(b). "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich*, 399 N.W.2d at 214. Whether a common question of fact or law exists involves proof of "standardized conduct of the defendants toward members of [a] proposed class . . . a common nucleus of operative facts is typically presented, [to meet] the commonality requirement of Rule 23(a)(2) . . . ." *Franklin v. Chicago*, 102 F.R.D. at 949.

Here, the Plaintiffs have alleged a wide variety of fraudulent and deceptive sales practices over an eight year period of time, affecting potentially 22,000 Minnesota borrowers. Ameriquest argues that the Plaintiffs have not alleged any course of conduct that affects all class members, even to the extent "that at least one of the elements of that cause of action is shared by all class members." *Mooney v. Allianz Life Ins. Co. of North Am.*, No. 06-545 ADM/FLN, 2007 WL 128841, at *6 (D. Minn. Jan. 12, 2007). Ameriquest argues that the decision of an individual borrower to take out an Ameriquest loan is influenced by a host of individual factors, and that there is no identifiable deceptive or fraudulent practice that ties the claims together. *Cf. id.* at *3

(discussing misrepresentation in consumer brochure); *In re Lutheran Bhd Variable Insur.* 201 F.RD. 456, 471 (D. Minn. 2001) (discussing common sales illustrations which created illusion that policyholder's obligation to pay premiums would end on a "vanish date" used in illustrations).

The Court is satisfied that Plaintiffs have identified sufficient common questions of law and fact common to the class, through their claims, described in detail above, that Ameriquest has promoted practices and policies of concealment and misrepresentation. The fact that the allegations are not limited to one form of deceptive or fraudulent practices, but rather a multitude of them, which might impact consumers in a variety of ways, does not defeat a claim of class commonality. To hold otherwise would have the untoward effect of rewarding an alleged wrongdoer who commits massive fraud or deception, manifested in a multitude of ways, over a less egregious party. The overarching class issues alleged by the Plaintiffs are sufficient to establish common questions of law and fact.

iii. **Typicality**

Minn. R. Civ. P. 23.01(c) focuses on whether the "claims or defenses of representative parties are typical of the claims or defenses of the class . . . ." Minn. R. Civ. P. 23.01(c). This requirement focuses on the similarity of the legal remedial theories raised by the Plaintiffs and the class members, and whether "the claims of the named plaintiffs emanate from . . . the same legal theory as the claims of the class members." *In re Potash Antitrust Litig.*, 116 F.R.D. 682, 690 (D. Minn. 1994) (citation and quotation marks omitted). The purpose of the typicality requirement is to ensure that the interests of the class and the class representatives are aligned, "so that the latter will work to benefit the entire class through the pursuit of their own goals." *Lewy 1990 Trust v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 453 (Minn .Ct. App. 2002) (citation and quotation marks omitted).

Ameriquest asserts the proposed class includes borrowers with vastly different

characteristics, and that the individual circumstances of thousands of loans does not lend itself toward class certification. Ameriquest further contends that the Plaintiff class contains a scattershot of allegations which do not demonstrate any centralized, unlawful policies or practices.

However, the Plaintiffs have alleged numerous centralized unlawful policies and practices, which if true, might affect consumers in a variety of different ways. "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). Despite individualized differences, class certification is appropriate if the injuries arise out of the same general conduct. *See Schling v. Edina Realty Title*, No. CT 02-018380, 2003 WL 23786984, at *5 (Minn. D. Ct. Sept. 9, 2003) ("While the putative members may not all have been injured to the same degree in exactly the same way, their injuries arose out of the same general conduct . . . .").

The Court has previously described the individual claims of the class representatives, and incorporates that discussion by reference. Each of the named plaintiffs makes claims of improper concealment or deception. Despite variations in the way the individual Plaintiffs are affected by one or more of the alleged deceptive practices, the claims are sufficiently typical to meet the requirements of Minn. R. Civ. P. 23.01(c).

iv. Adequacy of Class Representation

Minn. R. Civ. P. 23.01(d) requires that the class representatives "fairly and adequately protect the interests of the class." Minn. R. Civ. P. 23.01(d). To do so, the Plaintiffs must meet two requirements: (a) the class representatives' attorney must be qualified, experienced, and generally able to conduct litigation, and (b) the class representatives' interests must not be antagonistic to those of the class. *In re Workers' Comp.*, 130 F.R.D. 99, 107 (D. Minn. 1990).

The proposed class representatives and their counsel satisfy this requirement. The named Plaintiffs have pursued their claims and fully participated in all discovery. *See Lewy 1990 Trust v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 455 (Minn. Ct. App. 2002) ("General knowledge and participation in discovery are enough to demonstrate representational adequacy."). In addition, their counsel has significant experience prosecuting class actions and claims alleging consumer fraud and predatory lending. One of the Plaintiffs' law firms was recently appointed by Judge Marvin Aspen to serve as co-lead counsel in the ongoing federal multidistrict litigation against Ameriquest involving similar claims. There is nothing in the record to suggest that the Plaintiffs have interests adverse to the class, or that that their counsel will not vigorously represent their interests, and the Court concludes that the Plaintiffs have met the adequacy of representation requirement set forth in Minn. R. Civ. P. 23.01(d).[8]

b. Minn. R. Civ. P. 23.02(c) Requirements

For a class action seeking damages, the Court must find under Minn. R. Civ. P. 23.02(c) that "the questions of law of fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* The issues to be considered in this inquiry include "(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action." *Id.*

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[8] The Court does have a concern based upon Ameriquest's assertion that the Plaintiff class has not identified persons with knowledge of the alleged class wide practices, coupled with the late disclosure of Mr. Bomchill's declaration. The involvement of class counsel in multidistrict litigation on the same issues suggests expertise about

i. Predominance

To establish predominance, "common issues must constitute a significant part of the individual cases." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 826 (Minn. Ct. App. 2000). The Plaintiff class alleges that Ameriquest engaged in a widespread pattern of consumer fraud, including material omissions and misrepresentations in the process of lending money to residential borrowers. The Plaintiff has assumed the substantial evidentiary burden of establishing a corporate culture and pattern and practice of fraud and deception, and a regular operating procedure of fraud and deception over an eight year period of time. The Court is not permitted to assess the merit of the claims, or judge the weight of the evidence supporting the claims. *Eisen*, 417 U.S. at 157-58. Rather, for the purpose of this motion, the Court must take as true the substantive allegations in the complaint, and determine whether the class issues predominate over the individual claims. *Potash, 159 F.R.D. at* 693-94.

To establish common issues under the predominance standard of Minn. R. Civ. P. 23.02(c) and Minn. Stat. § 325F.69 (1), "[t]he Defendant must intend that its conduct be relied on, but reliance by the victim is not necessary for the violation to occur." *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). Following *Group Health*, both state and federal courts in Minnesota have certified class actions under the Minnesota Consumer Fraud Act ("MCFA"), Minn. Stat. § 325.68, and the Minnesota Deceptive Trade Practices Act ("MDTA"), Minn. Stat. § 325D.44, without requiring a showing of individual reliance by class members.[9]

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the company, the industry, and economies of scale.

[9] *See In re Lutheran Variable Insur.*, 201 F.R.D. 456 (D. Minn. 2001) (certifying § 325F.69 claims that defendant sold "vanishing premium" life insurance using deceptive disclosures, representations, and sales practices) *rev'd in part on other grounds*, 425 F.3d 1116 (8th Cir.); *Mooney v. Allianz Life Ins. Co.*, No. 06-545 ADM/FLR, 2007 WL 128841 (D. Minn. Jan. 12, 2007) (rejecting argument that class consumer fraud claims under Minn. Stat. § 325F. 69 requires proof of individual reliance); *In re St. Jude Med. Inc., Silzone Heart Valves Prod. Liab. Litig.*, No. MDL 01-1296 JRTFLN 2003 WL 1589527, at *8 (D. Minn. 2003), *rev'd in part on other grounds*, 425 F.3d 1116 (8th Cir. 2005) (discussing individual reliance but finding that common questions of law predominate in plaintiffs case under Minn. §§ 325D.44);

To establish predominance, however, the Plaintiffs must demonstrate that common issues "constitute a significant part of the individual cases." *Lewy*, 650 N.W.2d at 455. Ameriquest argues that Plaintiffs cannot articulate any statement, action, or omission which ties the class together, and that the individual questions of fact and law which may affect each borrower predominate over common questions.

Here, however, the Plaintiffs claim a centralized corporate policy of calculated omission and deception, manifested in multiple specific practices which are described previously. The Plaintiffs allege a common course of conduct by Ameriquest, including that the company trains and encourages its sales staff to engage in predatory high-pressure sales tactics against low-income, vulnerable consumers; that Ameriquest has trained its sales staff to falsely represent the alleged benefits and financial savings of consolidating debt, and to maximize loan amounts beyond what is affordable or beneficial to borrowers; that Ameriquest systematically fails to provide loan documents prior to closing; and that Ameriquest conceals unfavorable loan terms such as "discount" fees, pre-payment penalties, and the adjustable nature of the loan; and that that company has corporate practice to inflate appraisal values, fabricate income statements, and forge documents. The Plaintiffs allege that Ameriquest targets individuals who pose a credit risk and may be unable to obtain financing elsewhere, such as persons with credit problems, significant debt, or recent tax liens or bankruptcies, and that. The Plaintiffs assert as a predominant corporate culture and practice that Ameriquest preys on vulnerable prospects by offering to reduce their debt, lower their monthly payments, and consolidate their existing debt obligations, allegedly to the consumer's financial advantage, but actually to their detriment.

Schling v. Edina Realty Title, Civil No. CT 02-018380 , 2003 WL 23786984 (Minn. Dist. Ct. Sept. 9, 2003) (certifying class claims under MCFA and MDTPA based on alleged failure to disclose actual fees and improper fee inflation, and applying *Group* Health principle that class members need not establish individual reliance on alleged misrepresentations).

The Plaintiffs allege specific common issues of fact which predominate over individual claims, including that Ameriquest's sales staff are trained to (1) avoid direct responses to rate or fee inquiries by prospective borrowers; (2) falsely represent that Ameriquest loans offer monetary savings through debt consolidation, access to cash through extended equity programs, tax savings, shorter loan terms, and payment referrals; and (3) maximize loan amounts to the detriment of borrowers by encouraging substantial debt consolidation and a maximum cash out, and touting Ameriquest's high loan-to-value ratio. The Plaintiffs further allege that Ameriquest has systematically pressured low-income, vulnerable borrowers by a variety of bait and switch or concealment tactics, including encouraging borrowers not to read loan documents, concealing or switching loan terms in the final closing documents, and offering loans that borrowers cannot afford and which offer no real benefit. The Plaintiffs allege that Ameriquest's "culture" includes the "common and accepted practice" of sales staff in forging or altering borrower information or loan documents, and concealing key loan terms such as the pre-payment penalty, the discount points, and the adjustable nature of the loan. The Plaintiffs describe a work environment at Ameriquest which emphasizes high-pressure salesmanship, high and aggressive loan quotas, and a compensation policy which rewards sales staff for high volume sales.

The common scheme or plan alleged in the marketing, solicitation, and sale of loans, the timing of disclosure or the lack of disclosures, and representations or misrepresentations by Ameriquest as to the nature, purpose, and benefit of its loans raise common class of fact which predominate over individual claims, and which satisfy the "predominance" prong of Minn. R. Civ. P. 23.02(c). The Court finds that, despite the multiple forms of alleged fraud and deception, and the large size of the class with the potential for a large number of individual variations, the alleged

common failure to disclose and misrepresent in consumer loan transactions is sufficient to establish predominance. *Cf. Mooney*, 2007 WL 128841, at *9 (stating individual reliance not required in claims under MPCFA where company allegedly fraudulently marketed annuity products, despite individualized differences in knowledge, harm, and reliance); *In re Lutheran Brotherhood,* 201 F.R.D. at 460-461 (class claims of deceptive disclosures, representations, and sales practices in sales of life insurance policies certified under Minn. Stat. § 325F.69); *Schling*, 2003 WL 23786984, at *3-4 (class claims certified under MDTPA and MCFA despite arguments that each class member presented individual issues of knowledge, reliance, and confusion, where title company allegedly failed to disclose fees, inflated fees, and contractual relationships); *In re. St. Jude Med., Inc., Silzone Heart Valves Prodl. Liab. Litig.*, 2003 WL 1589527, at *18-19 (finding class claims certified under Minn. Stat. §§ 325D.44 and 325F.69 where plaintiffs alleged misleading disclosures and marketing materials).

In finding that a common scheme or claim predominates over individual issues based upon the class claims made by Plaintiff, the Court has adhered to its charter not "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 157. The Court emphasizes that in certifying a class with such broad and sweeping claims, covering 22,000 transactions over an eight year period, the Court will assess, at the appropriate time, whether Plaintiffs can meet their substantive burden, and whether if they cannot, the class should remain certified. *See* Minn. R. Civ. P. 23.03(a)(3) ("An order under Rule 23.03(a)(1) may be altered or amended before final judgment").

ii. **Superiority**

The final requirement for class certification in Minn. R. Civ. P. 23.02(c) is that a class action must be the superior method of adjudicating claims. In other words, the question is whether

the case is manageable as a class action, or whether the claims are better suited to proceed in the form of individual actions. *See In re Workers' Comp.*, 130 F.R.D. at 110. The class claims made by Plaintiffs assert that Ameriquest has engaged in specific predatory forms of consumer fraud and deceptive trade practices on vulnerable, low-income, unsophisticated borrowers. The evidence Plaintiffs propose to prove their claims focuses on centralized evidence of policies and practices. If Plaintiffs can prove their claims, there may indeed be significant individual differences in class member damages. However, "Courts frequently grant class certification despite individual differences in class members' damages." *Lewy*, 650 N.W.2d at 446-47.

The Court concludes that class action treatment is the superior method to address whether Ameriquest has engaged in a widespread, systematic practice of consumer lending fraud, and that to have one trial on this issue is superior to multiple trials throughout Minnesota by individual consumers.

The heart of Plaintiff's claim is that Ameriquest preys on low-income, unsophisticated consumers. Class action treatment allows the sophisticated and technical claims derived from a complex lending process to be advanced in one forum, by expert class counsel, with adequate resources to marshal the evidence, conduct full and fair discovery, and present the claims for trial. The Court is reasonably confident that any manageability issues can be addressed as the case unfolds, or if the Plaintiffs have overestimated the power and significant of their centralized evidence over individualized claims, through summary judgment or other appropriate motions. On balance, the Court concludes that, considering "superiority" issues of "manageability, fairness, efficiency, and reasonable alternatives," *Levy*, 650 N.W.2d at 457, the "superiority" requirement of Minn. R. Civ. P. 23.02(c) is satisfied.

For the reasons stated above, IT IS ORDERED that:

1. Ameriquest's motion to strike the declaration of Mark Bomchill for the purpose of determining class certification is GRANTED.

2. The Plaintiffs motion to certify a class is GRANTED.

3. Pursuant to Minn. R. Civ. P. 23.03(a)(2), and subject to further order of this Court, the class shall be defined as "All persons (i) who presently own, or during the Class Period owned, property (including mobile homes) in Minnesota, and (ii) who entered into a mortgage loan transaction relating to such Minnesota property with Defendant at any time between February 17, 1999, and the present ("the Class").

   Excluded from the Class are any judicial officer assigned to this matter; Defendant; the parents, subsidiaries and affiliates, officers and directors of Defendant or any entity in which a Defendant has a controlling interest; and the legal representatives, successors, or assigns of any such excluded persons."[10]

4. Pursuant to Minn. R. Civ. P. 23.03(a)(2), and subject to further order of this Court, the class is certified to include the following class claims and issues: (a) Whether Ameriquest trains and encourages its sales staff to engage in predatory high-pressure sales tactics against low-income, vulnerable Minnesota consumers; (b) Whether Ameriquest trains and encourages its sales staff to falsely represent the alleged benefits and financial /savings of consolidating debt, and to maximize loan amounts beyond what is affordable or beneficial to Minnesota borrowers; (c) Whether Ameriquest systematically fails to provide loan documents prior to closing, conceals unfavorable loan terms such as "discount" fees, pre-payment penalties, and the adjustable nature of the loan; (d) Whether Ameriquest inflates appraisal values,

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[10] The Court declines to use Plaintiff's more expansive class definition which includes "Defendant *or its predecessors, directly or indirectly*." (emphasis added). Plaintiffs' claim of class wide fraud or deception is based upon 22,000 transactions involving Ameriquest over eight years, and the Court is disinclined to certify class claims against

fabricates income statements, and forges documents; (e) Whether Amerquest systematically targets Minnesota borrowers who pose a credit risk and may be unable to obtain financing elsewhere, such as persons with credit problems, significant debt, or recent tax liens or bankruptcies, and preys on vulnerable prospects by offering to reduce their debt, lower their monthly payments, and consolidate their existing debt obligations, allegedly to the consumer's financial advantage, but actually to their detriment; (f) Whether Ameriquest systematically charges consumers excessive, duplicative, or otherwise improper closing costs in the form of unfair and undisclosed lenders' processing fees, administrative fees, and application fees.

5. Subject to further order of this Court, the class representatives are Luke Ricci and Traci Ricci, Terri Seck, and Terri Baumgartner. Lieff, Cabraser, Heimann & Bernstein, L.L.P., and Zimmerman Reed P.L.L.P are designated as counsel for the class.

6. Within 14 days of this Order, Class counsel, in consultation with Ameriquest, shall submit a class notice to the Court for approval. Once approved by the Court, class counsel shall cause the class notice to be mailed in the name of the Court Administrator by first class mail, postage prepaid (by the Plaintiff class, not the Court), to all class members identified through reasonable efforts by Ameriquest. Further, Class counsel shall cause to be published in the five largest newspapers in the State of Minnesota, a notice by publication submitted to and approved by the Court, after consultation with counsel for Ameriquest. The Notice shall be published solely at the expense of the Plaintiff Class, and not the Court.

7. Any final judgment, whether favorable or unfavorable, shall bind all members of the class. Class members may choose to exclude themselves from the class by filing with Class

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unspecified predecessors, with the additional general language of "directly or indirectly."

counsel, within 45 days after notice is mailed, a form approved by the Court, or any other appropriate written indication that they request exclusion from the class.

8. Within 15 days after the 45-day period for exclusion from the class has passed, Class counsel shall file with the Court Administrator, under seal, an affidavit (a) identifying the persons who have requested exclusion; (b) identifying the persons known to Class counsel who have signed binding waivers and releases in the Attorney General settlement referenced above; (c) identifying the persons to whom notice has been mailed and who have not timely requested exclusion; (d) identifying the persons whose Notice has returned to Class counsel as undeliverable.

BY THE COURT:

Dated: April 18, 2007

Lloyd B. Zimmerman
Judge of District Court